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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 441

ROBERT E. WYNGAARD

Petitioner,

v.

ROBERT F. KENNEDY, Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement	6
Reasons for Granting the Writ	7
Conclusion	16

CITATIONS

Cases:

Ablett v. *Brownell*, 99 U.S. App. D.C., 387, 389, 240 F. 2d 625, 627 (1957) 14

Babouris v. *Esperdy*, 269 F.2d 621 (C.A. 2, 1959) 2, 8

Barber v. *Gonzalez*, 347 U.S. 637, 642-643 16

Ex Parte Isojoki, 22 Fed. 151 (N.D. Cal., 1915) 7, 9

Ex Parte Rocha 30 F. 2d 823 (S.D. Tex. 1929) 8, 9

Fong Haw Tan v. *Phelan*, 336 U.S. 6, 10 16

Guarino v. *Uhl*, 107 F.2d 399 (C.A. 2, 1939) 14

Holzapfel v. *Wyrsch*, 259 F.2d 890 (3rd Cir.) (1958), 2, 7, 8, 14

Jordan v. *De George*, 341 U.S. 223 (1951) 12, 14, 15, 16

Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 16

Lewis v. *Frick*, 189 Fed. 146, C.C. E.D. Mich., 1911, Reversed on other grounds, 233 U.S. 291 (1914) 11

Matter of C., 2 I & N Dec. 367 (1945) 11

Matter of F(lores)-R(odriguez), 6 I & N Dec. 814 817 (1955) 11

National Labor Relations Board v. *Gullet Gin Co.*, 340 U.S. 361, 365 (1950) 11

People v. *Harvey*, 307 N.Y. 588, 590, 591, 123 N.E. 2d 81 (1954) 10

People v. *Kaufman*, 1 N.Y.S. 2d 362 (1937) 10

People v. *McCarthy*, 67 N.Y.S. 2d 560, 563 (1947) 10

People ex rel. Stolofsky v. *Superintendent*, 259 N.Y. 115, 119 (1932) 10

Page

Pino v. *Nicolls*, 119 F.Supp. 122, 125 (D. Mass.), aff'd, 215 F.2d 237, 243 (1st Cir.) (1954) 8
Pino v. *Landon*, 349 U.S. 901 (1955) 2, 7, 8
Rochen v. *California*, 342 U.S. 165, 168 (1951) 9
Thompson v. *Louisville*, 362 U.S. 199 (1960) 16
U.S. ex rel. Mylius v. *Uhl*, 203 Fed. 152, Aff'd. 210 Fed. 860 (1914) 14, 15
United States v. *Atchison T. & S.F.R. Co.*, 220 U.S. 37 (1910) 13
United States v. *Flores-Rodriguez*, 237 F.2d 405 (C.A. 2, 1956) 2, 8, 11
United States v. *Mersky*, 361 U.S. 431, 441 (1959) 13
United States v. *Williams*, 341 U.S. 70, 82 (1950) 13
United States ex rel. Freislinger v. *Smith*, 41 F.2d 707 (7th Cir.) (1930) 2, 7, 9
Winters v. *New York*, 333 U.S. 507 (1947) 15

Statutes and Regulations:

Act of March 3, 1891 (26 Stat. 1084) 11
Immigration Act of 1917, 39 Stat. 875 13

Immigration and Nationality Act of 1952:

Sec. 4 [8 U.S.C. 1182(a)] 2, 3, 6, 8
Sec. 212(a) (9) [8 U.S.C. 1182(a)(9)] 2, 3, 8, 10, 11
Sec. 212(a)(10)[8 U.S.C. 1182(a)(10)] 3, 12, 13
Sec. 241 (8 U.S.C. 1251) 3

New York Penal Law:

Article 2 4, 10
Section 722 4, 5
Section 722(8) 2, 5, 6, 7, 10, 11, 14

United States Code:

18 U.S.C. 1 3, 4
28 U.S.C. 2282 7
28 U.S.C. 2284 7

Miscellaneous:

	Page
Analysis of S. 3455	12
Analysis of S. 716, Section 212(10)	12
Annual Report Immigration & Naturalization Service, 1960	9
H.R. 5678, 82nd Cong., 1st Sess.	13
43 Harvard Law Review 117 (1929)	14
House Report 3808, 51st Cong., 2d Sess., p. 2	11
S. 716, 82nd Cong., 1st Sess.	12
S. 2550, 82nd Cong., 2nd Sess.	13
S. 3455, 81st Cong.	12, 13
S. Report 352, 64th Cong., 1st Sess., p. 15	12

SUPREME COURT OF THE UNITED STATES

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No.

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Petitioner,

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ROBERT F. KENNEDY, Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the District Court.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pp. 17-19. The opinion of the District Court is unreported and is set forth in the Appendix at pp. 21-22.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the Court of Appeals below was correct in following the ruling of the Second Circuit in *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (C.A. 2, 1956), and *Babouris* v. *Esperdy*, 269 F. 2d 621 (C.A. 2, 1959), that the determination whether an alien has committed a "crime" within the purport of the phrase "crime involving moral turpitude" in 8 U.S.C. 1182(a)(9) is a federal question and is not to be decided by reference to the law of the state in which the offense has been committed, in view of the contrary rulings in *Pino* v. *Landon*, 349 U.S. 901 (1949); *Holzapfel* v. *Wyrsch*, 259 F. 2d 890 (C.A. 3.) (1958); and *United States ex rel. Freislinger* v. *Smith*, 41 F. 2d 707 (C.A. 7.) (1930).

2. Whether a conviction of the offense of disorderly conduct under New York Penal Law is a conviction of a crime involving moral turpitude.

3. Whether the term, *crime involving moral turpitude*, written into a deportation statute [8 U.S.C. 1182(a)(9)] is sufficiently definite to encompass conduct known as disorderly conduct under a New York statute [Penal Law Section 722(8)], when such an offense is not defined as a crime under New York law, is less important than a misdemeanor, does not entitle the defendant to a jury trial, and which lacks other criminal safeguards or consequences, and whether the term, *moral turpitude*, as applied to the offense of disorderly conduct is sufficiently definite to avoid the constitutional prohibition against vagueness in a deportation statute.

Statutes Involved

Section 241 of the Immigration and Nationality Act (8 U.S.C. 1251) provides:

> "(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

Section 212(a)(9) of the Immigration and Nationality Act [8 U.S.C. 1182(a)(9)] provides:

> "Sec. 212(a) The following classes of aliens shall * * * be excluded from admission into the United States:
>
> "(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) * * *."

* * * * * * *

Section 4 of the Act of September 3, 1954 [8 U.S.C. 1182(a)] provides:

> "Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of Section 1 (3) of Title 18 (U.S.C.), by reason of the punishment actually imposed * * * may on and after September 3, 1954 * * * be * * * admitted to the United States if otherwise admissible; *Provided*, That the alien has committed only one such offense."

* * * * * * *

Section 1, Title 18 U.S.C., provides:

"Offenses classified.

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

* * * * * * *

Article 2 of the New York Penal Law provides:

"Division of Crime. A crime is: 1. A felony; or 2. A misdemeanor. *Felony.* A 'felony' is a crime which is or may be punishable by 1. Death; or 2. Imprisonment in a State prison. *Misdemeanor.* Any other crime is a 'misdemeanor'."

* * * * * * *

Section 722 of the New York Penal Law provides:

DISORDERLY CONDUCT

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

"5. Shouts or makes a noise outside or inside a building during the night time to the annoyance or disturbance of any considerable number of persons;

"6. Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag;

"7. Stations himself on the public streets or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the public streets unlawfully;

"8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;

"9. Causes a disturbance in any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;

"10. Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;

"11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts.

"12. In any prosecution under subdivision eleven of this section the fact the defendant is engaged in an

illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an unlawful purpose."

Statement

Petitioner, a native and citizen of Holland, has maintained a residence in the United States since his lawful admission in 1948. In 1957 he was readmitted as a lawfully returning resident. In 1952 he was convicted of petty larceny in New York and paid a fine of $50.00. In 1955 he was found guilty of disorderly conduct in violation of the New York Penal Section 722(8) and received a ninety day sentence (R. 1-4).

Deportation proceedings were instituted in 1957 upon the ground that petitioner was excludable at the time of his 1957 reentry in that his 1955 disorderly conduct violation was a crime involving moral turpitude. (R. 14-16) A single petty crime involving moral turpitude may be waived under 8 U.S.C. 1182(a). Accordingly, the petty larceny charge would not result in deportation. Only if the disorderly conduct offense of 1955 is a crime involving moral turpitude, is petitioner's deportation required. This the Attorney General conceded below (R. 4). This was the basis for the order of deportation by the Board of Immigration Appeals (R. 14).

Prior to December, 1955, the consistent administrative construction of the New York Penal Law, Disorderly Conduct, Section 722(8), was that the offense was not a crime involving moral turpitude (Answer, Par. 11, R. 5). This change in the prior construction of the statute resulted in the proceedings and the order to deport the petitioner.

Petitioner contended in the District Court that he was not deportable upon the following grounds:

1. That insofar as applied to him, the statute is unconstitutional for vagueness. As application was made for injunctive relief, request was made for the convening of a three judge district court pursuant to 28 U.S.C. 2282 and 2284. This request was denied by order dated June 30, 1960 (R. 12).

2. That disorderly conduct is not a crime in New York and accordingly he may not be deported on this charge.

3. That his offense does not involve moral turpitude.

The District Court denied the motion for the convening of a three judge district court and on October 4, 1960, summary judgment was rendered in favor of the Attorney General (R. 18).

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed, holding that no substantial constitutional question is presented as to the vagueness of the statute, and that a violation of Section 722(8) of the Disorderly Conduct Statute in New York constitutes a crime involving moral turpitude.

Reasons for Granting the Writ

1. The decision of the Court of Appeals for the District of Columbia Circuit is in direct conflict with the decision of this Court in *Pino* v. *Landon*, 349 U.S. 901 (1955), and with rulings of the Third Circuit in *Holzapfel* v. *Wyrsch*, 259 F. 2d 890 (1958); of the Seventh Circuit in *United States ex rel. Freislinger* v. *Smith*, 41 F. 2d 707 (1930); in the Ninth Circuit in *Ex Parte Isojoki*, 222 Fed. 151 (N.D.

Cal., 1915); and in the Fifth Circuit in *Ex Parte Rocha*, 30 Fed. 2d 823, 824 (S. D. Texas, 1929).

The Court below, following decisions of the Second Circuit in *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (1956), and in *Babouris* v. *Esperdy*, 269 F. 2d 621 (1959), held that the determination whether an alien has committed a *crime* for the purpose of ruling whether he is excludable from the United States under 8 U.S.C. 1182(a)(9) for having been convicted of a "crime involving moral turpitude" is a federal question and is not to be decided in accordance with the law of the state in which the offense has been committed.

In *Pino* v. *Landon*, *supra*, this Court reversed a decision of the First Circuit, sub nom. *Pino* v. *Nicolls*, 215 F. 2d 237, 243 (1954), which had held that the "meaning of the term 'convicted' [in the same phrase appearing at 8 U.S.C. 1182(a)(4)] is a federal question". Upon a record which established that under Massachusetts law, the alien's sentence had been revoked and the case "placed on file" [*Pino* v. *Nicolls*, 119 F. Supp. 122, 125 (D. Mass., 1954)], this Court ruled that "on the record" there was not a final conviction, notwithstanding the argument of the Solicitor General there that the "word 'convicted' as used in this federal statute * * * must be resolved by reference to Federal law" (Brief for Respondent, No. 333, October Term, 1954 p. 16).

In *Holzapfel* v. *Wyrsch*, *supra*, the Third Circuit, contrary to the Court below, looked to no "federal" standard of crime but instead "looked to the law and procedure of the state" to hold that a violation of a sex offenders' statute in New Jersey is not a penal offense and therefore did not entail a crime involving moral turpitude for the purpose of the federal deportation statute.

United States ex rel. Freislinger v. *Smith, supra,* similarly held:

> "* * * in determining whether or not (an alien) was convicted of such crime (one involving moral turpitude) we are governed by the laws of the (the State of Illinois)." (at 708)

See also *Ex Parte Isojoki,* 222 Fed. 151 (N. D. Cal., 1915), and *Ex Parte Rocha,* 30 F. 2d 823, 824 (S. D. Texas, 1929).

The reasons for this rule have been made clear by this Court in *Rochen* v. *California,* 342 U.S. 165, 168 (1951):

> "In our federal system the administration of criminal justice is predominantly committed to the care of the States * * *. Broadly speaking, crimes in the United States are what the law of the individual states make them * * *."

An authoritative resolution of this question is plainly required in the interest of a uniform interpretation of the deportation laws. Otherwise, the deportation of aliens for violations of crimes involving moral turpitude will turn in the District of Columbia and the Second Circuit upon a "federal" standard, but in the Third and Seventh Circuits and in other Districts upon "state" standards.

The problem, of course, is of no isolated importance. Since the Immigration and Nationality Act of 1952 was enacted, 4,928 aliens have been deported and 1,113 aliens have been excluded from the United States for convictions of crimes involving moral turpitude. See Annual Report of the Immigration and Naturalization Service, 1960, Table 21, p. 52, and Table 26, p. 58.

Thus, review of this question is warranted in order to guide the proper administration of the deportation provisions in the Immigration and Nationality Act.

2. The petitioner was convicted under Section 722(8) of the New York Penal Law of the "offense of disorderly conduct".[1]

The Court's ruling below poses a number of questions:

(1) Whether the "offense of disorderly conduct" may be held to be a "crime" within the meaning of 8 U.S.C. 1182(a)(9) in view of explicit New York statutory and decisional law that such an offense is not a crime.

Under the relevant New York law, an "offense" is not a crime. See Article 2, New York Penal Law which defines "crime" as a "felony" or a "misdemeanor" and the following holdings and comments as to the nature of the offense of disorderly conduct:

> "• • • a petty, quasi-criminal • • • lesser offense not amounting to a misdemeanor. *People ex rel. Stolofsky* v. *Superintendent*, 259 N.Y. 115, 119 (1932).
>
> "• • • its substance • • • is (a) breach (of) the public peace' as distinguished from misdemeanors • • • which are 'seriously' disturbing to the public peace • • •." *People* v. *Harvey*, 307 N.Y. 588, 590-591 (1954).
>
> "• • • designate(s) minor offenses, below the grade of misdemeanors, which are quasi-criminal in nature, but not strictly criminal." *People* v. *Kaufman*, 1 N.Y.S. 2d 362 (1937).
>
> "• • • defined as an 'offense' and not a crime." *People v. McCarthy*, 67 N.Y.S. 2d 560, 563 (1947).

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[1] This section provides in pertinent part:

"Disorderly conduct. Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

• • • • • • •

"8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness • • •."

Until the decision of the 2nd Circuit in *United States* v. *Flores-Rodriguez, supra,* the immigration authorities had followed what had been a settled rule since *Lewis* v. *Frick*, 189 Fed. 146 (D.C. E.D. Mich., 1911), reversed on other grounds, 233 U.S. 291 (1914), that a disorderly conduct conviction, regardless of the specific nature of the charged behavior, does not constitute a crime involving moral turpitude within the meaning of the deportation statutes. See *Matter of C—*, 2 I & N Dec. 367 (1945), and specifically *Matter of F(lores)-R(odriguez)*, 6 I & N Dec. 813, 817 (1955), where the Board of Immigration Appeals expressly held as to a violation of 722(8) of the New York Penal Law: "The offense * * * does not render (the alien) inadmissible as a criminal alien * * *."

Whether the Court below is correct in joining the Second Circuit in discarding this rule, which had become grafted in the statute by Congressional reenactment, *National Labor Relations Board* v. *Gullet Gin Co.*, 340 U.S. 361, 365 (1950), deserves consideration by this Court.

(2) Whether petitioner's offense may be held to be a "crime" within the meaning of 8 U.S.C. 1182(a)(9) in view of the legislative history of the term "crime involving moral turpitude" in the present statute.

(A) *Legislative History of Phrase "Crimes Involving Moral Turpitude."* The legislative history of the term, *moral turpitude*, indicates it was never intended to apply to minor offenses, such as disorderly conduct. The term, *moral turpitude*, first appeared in the exclusion provisions of the Immigration statute in the Act of March 3, 1891 (26 Stat. 1084). The accompanying report (House Report 3808, 51st Cong., 2nd Sess., p. 2) stated that the bill barred:

> "persons who have been convicted of a felony or other infamous crimes."

The Government in its Supreme Court brief in *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951), suggests, as did the Congress passing the 1917 Immigration Act (Senate Report No. 352, 64th Cong., 1st Sess., p. 15), that crimes involving moral turpitude are "serious penal offenses".

(B) *Legislative History of the Term "Offense"*. As originally proposed to Congress in S. 3455, 81st Congress, Section 212(a)(10) [8 U.S.C. 1182(a)(10)], would have excluded aliens who committed two "crimes." The General Counsel of the Immigration Service [File No. 56190/113—comments on S. 3455 (on file in Supreme Court Library)] stated to Congress with reference to this section and the use of the word "crimes" as follows:

> "It is reasonable to anticipate litigation and controversy concerning the meaning of the word 'crimes' as used here, particularly since, in some jurisdictions, some violations of law may not be considered crimes, such as violations of municipal ordinances, traffic laws, or offenses involving juveniles. It is not clear whether the bill intends that a violation of any statute, law, or ordinance, for which a sentence of confinement is possible, is to be considered a 'crime' within the meaning of this section."

Thereafter, the word "offense" was inserted in the revised version of the proposed bill, S. 716, 82nd Cong., 1st Sess., at Section 212(a)(10).

In its analysis of the substituted language, which it had proposed, the Immigration and Naturalization Service declared [Analysis of S. 716, Section 212(10)] (on file U. S. Supreme Court Library):

> "The use of the word 'offenses' instead of 'crimes' is obviously intended to overcome the necessity to determine whether certain convictions, in fact, consti-

> tute crimes. This paragraph is apparently intended to have the effect of excluding from the United States those aliens who are repeated law violators, regardless of the gravity of the offenses for which they were convicted * * *."

While the language proposed for what has become 8 U.S.C. 1182(a)(10) was broadened, the statutory language for the provisions under which the petitioner's deportation is now sought was tightened. The previous statute, the Immigration Act of 1917, 39 Stat. 875, provided, in the comparable section, for the exclusion of persons who have been convicted of a:

> "felony or other crime or misdemeanor involving moral turpitude." 8 U.S.C. 136(c).

The original draft of the proposed legislation, S. 3455 with its subsequent revisions in S. 716, H. R. 5678, 82nd Cong., 1st Sess., and S. 2550, 82nd Cong., 2nd Sess., each provided for exclusion solely for *crimes* involving moral turpitude, thus eliminating the previous reference to *misdemeanors*, and making no provision whatsoever for the lesser violations known as *offenses*. The statute was enacted in this form. See 8 U.S.C. 1182(a)(9).

In these circumstances, the use of the word "crime" in Section 212(a)(9) and the deliberate change to the word "offense" in the succeeding section should foreclose reading it by implication into the section from which it is absent. *United States* v. *Atchison T. & S.F.R. Co.*, 220 U.S. 37 (1910). Cf. *United States* v. *Williams*, 341 U.S. 70, 82 (1950); *United States* v. *Mersky*, 361 U.S. 431, 441 (1959).

(3) Whether the petitioner's offense can be held to be one involving moral turpitude in view of the well established doctrine that "evil intent" must inhere in such an

offense [*United States ex rel. Mylius* v. *Uhl*, 203 F. 2d 152 (D. N.Y., 1913), aff'd. 210 Fed. 860 (C.A. 2, 1914), *Ablett* v. *Brownell*, 240 F. 2d 625, 627 (C.A. D.C., 1957)]. Petitioner's offense, as appears from the express language of Section 722(8) of the New York Penal Law involves no evil intent whatever, which is required for the purpose of a deportation statute [Cf. *Guarino* v. *Uhl*, 107 F. 2d 399 (C.A. 2, 1939)], but only the commission of an act "whereby a breach of the peace may be occasioned."

This Court has had prior occasion to explore the reach of the phrase "moral turpitude" in the deportation statutes. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). Although this Court there declared that the term had "deep roots in the law" (p. 227) and upheld the term as applied to tax frauds upon the United States, the majority opinion recognized that there may be "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague * * *" (p. 231) and expressly limited its holding to "fraud (as) the touchstone by which (it) judged (that case)" (p. 232).

In view of the vast compass of the offense of disorderly conduct, a restatement of the bounds of the term "moral turpitude" in this borderline, marginal area seems required for the just and equitable administration of the deportation laws. A comparison of the result below with the result for the alien in *Holzapfel* v. *Wyrsch*, *supra*, where each alien engaged in comparable conduct, seems sufficient to demonstrate the unevenness and the inequity which has been the product of the varying judicial view of moral turpitude.

As Judge Wyzanski observed many years ago [43 Harvard Law Review 117 (1929)]:

> "Men who are menaced with the loss of civil rights should know with certainty the possible grounds of

forfeiture. And the loose terminology of moral turpitude hampers uniformity; it is anomalous that for the same offense a person should be deported or excluded in one circuit and not in another."

3. A further question, should it be necessary for the Court to reach it, is whether as applied to the offense of disorderly conduct, the term "moral turpitude" meets the test of definiteness required in a deportation statute. *Jordan* v. *DeGeorge*, 341 U.S. 223, 231 (1951).

The vagueness of the term "moral turpitude" has long been recognized. See *U. S. ex rel. Mylius* v. *Uhl*, 203 Fed. 153 (D. N.Y.), aff'd. 210 Fed. 860 (1914). Although as noted above, this Court sustained the term *moral turpitude* in *Jordan* v. *DeGeorge*, the Court prefaced its discussion with the caution that "the question of vagueness was not raised by the parties nor argued before this Court" (229), apparently believing the need nonetheless to treat the issue in view of the dissenting opinion (Cf. 341 U.S. 232).

Here, the petitioner has expressly raised the question (R. 3) and the courts below have each ruled adversely to the petitioner's contention (R. 11, 13, 19). The question is properly here. The touchstone for determining whether the term "moral turpitude" is unconstitutionally vague here is "disorderly conduct". It is the very "peripheral case" (p. 232) as to which this Court reserved decision.

The term "moral turpitude" as applied to the offense of "disorderly conduct" patently compounds vagueness upon vagueness both because of "uncertainty in regard to persons within the scope of the act" and the absence of "ascertainable standards of guilt".[2] *Winters* v. *New York*,

[2] Especially where the charged behavior, as here, involves soliciting for a "crime against nature" or "other lewdness".

333 U.S. 507, 515, and *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

By its extensive discussion of the issue in *Jordan* v. *DeGeorge*, although not raised by the parties there, this Court has recognized the importance of the question. Disorderly conduct statutes and ordinances, needless to say, are widespread, and their impact great upon those persons who are often least able to cope with arresting officers and to assert their rights in police and magistrate courts. Cf. *Thompson* v. *Louisville*, 362 U.S. 199 (1960). In view of the narrow construction required for deportation statutes (Cf. *Fong Haw Tan* v. *Phelan*, 336 U.S. 6, 10; *Barber* v. *Gonzalez*, 347 U.S. 637, 642-643, *Jordan* v. *DeGeorge*, *supra*), an examination of the constitutionality of this term is required in order to determine the limits of the deportation statute.

Conclusion

The questions presented by the present petition are of recurring and paramount importance in the implementation of the immigration and deportation laws. Accordingly, it is respectfully submitted that the petition for certiorari should be granted.

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SEPTEMBER, 1961.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16149

ROBERT E. WYNGAARD, APPELLANT,

v.

ROBERT F. KENNEDY, Attorney General of the United States, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 29, 1961

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellant. *Mr. Chester C. Short* also entered an appearance for appellant.

Mr. Nathan J. Paulson, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee. *Mr. Oliver Gasch*, United States Attorney at the time the record was filed, and *Mr. Donald S. Smith* and *Miss Doris H. Spangenburg*, Assistant United States Attorneys, also entered appearances for appellee.

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

PER CURIAM: Section 212 of the Immigration and Nationality Act, 8 U.S.C. §1182 (1958), provides in part:

> (a) . . . the following classes of aliens . . . shall be excluded from admission into the United States:
>
> * * * * *

> (9) Aliens who have been convicted of a crime involving moral turpitude (other than purely political offenses) . . .

Section 241 of the Act, 8 U.S.C. §1251 (1958), provides in part:

> (a) Any alien in the United States . . . shall, upon order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . .

Appellant, a citizen of Holland, had been admitted to the United States for permanent residence in 1948. In 1955 he was convicted of violating §722(8) of the New York State Penal Law.[1] In 1957 he was readmitted to the United States after a trip abroad. The Immigration authorities, after due notice and hearing, determined that appellant's violation of § 722(8) was a "crime involving moral turpitude" and that appellant was deportable since he had been excludable at the time of his last entry into the country.[2] Appellant brought suit for declaratory and injunctive relief. On cross motions, the court granted summary judgment for the Government.

In this appeal appellant first contends that the District

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[1] This section provides in pertinent part:

> "*Disorderly conduct.* Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> • • • • •
>
> "8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness . . . ."

[2] In 1952 appellant was convicted of petty larceny in New York. The Immigration authorities held this to be a crime involving moral turpitude. Since both this conviction and the conviction for violating § 722(8) were classifiable as petty offenses under 18 U.S.C. § 1 (1958), the Immigration authorities noted that appellant could not be deported had he been convicted of only one violation. 8 U.S.C. § 1182a (1958).

Court erred in refusing to convene a three-judge court on the issue of whether the phrase "crime involving moral turpitude" in § 1182(a)(9) is unconstitutionally vague. This question was dispositively answered contrary to appellant's contention in *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). In light of that decision, we think no substantial constitutional question is presented, and the motion to convene a three-judge court was properly denied. Cf. *Eastern States Petroleum Corp.* v. *Rogers*, 108 U.S. App.D.C. 63, 280 F. 2d 611 (1960).

Appellant further contends that violation of § 722(8) of the New York State Penal Law is not a "crime involving moral turpitude" within the meaning of § 1182(a)(9). The Court of Appeals for the Second Circuit has held to the contrary in two well reasoned opinions. *Babouris* v. *Esperdy*, 269 F. 2d 621 (1959); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (1956). We follow them.

Affirmed.

Filed, June 29, 1961. Joseph W. Stewart, clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

Civil 3267-59

No. 16149

ROBERT E. WYNGAARD, APPELLANT,

v.

ROBERT F. KENNEDY, Attorney General of the United States,

APPELLEE

Appeal from the United States District Court for the District of Columbia

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

JUDGMENT

This cause come on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: June 29, 1961.

Filed September 30, 1960

RULING

The COURT (J. Holtzoff:) This is an action for a declaratory judgment to review an order of the Attorney General directing the deportation of plaintiff on the ground of conviction of crimes involving moral turpitude. The facts are not in dispute and only a question of law is involved. Both sides move for a summary judgment.

One of the convictions on which the deportation order is predicated is a conviction in New York State under Section 722 of the New York Penal Law, on a charge of frequenting or loitering about any public place soliciting men for the purpose of committing a crime against nature or other lewdness. This offense is denominated in New York Penal Law as disorderly conduct.

New York Statutes distinguish between crimes and offenses and the violation of law involved in this case is classified as an offense. It is argued on behalf of the plaintiff that the conviction on this charge cannot be regarded as a conviction of a crime involving moral turpitude under the Deportation Statutes.

This precise question has been before the 2d Circuit which held in two cases that a conviction under this New York Statute is a conviction of a crime involving moral turpitude. *Babouris v. Esperdy*, 269 F 2d 621, and *United States v. Flores-Rodriguez*, 237 F.2d 405 and 409. The Second Circuit very cogently argues that what constitutes a crime involving moral turpitude is a federal question and is not dependent on the manner in which state law classifies the violation of law. It is not the nomenclature or the label attached by state codes that governs but the nomenclature and the definitions of the federal statutes.

The Court is convinced by the reasoning of the Second Circuit and will follow the conclusion reached by that eminent Court. Under the circumstances this Court concludes that the plaintiff's conviction to which reference has been made is a conviction of a crime involving moral

turpitude, and for that reason on the record in this case the plaintiff is deportable.

Plaintiff's motion for summary judgment will be denied and the defendant's motion granted

You may submit your order.

Filed October 4, 1960

JUDGMENT

This cause having come before the Court on cross-motions for summary judgment; argument of counsel having been heard; and the Court, upon due deliberation, having considered the record and having rendered its oral decision that there is no issue as to any of the facts and that defendant is entitled to judgment as a matter of law,

It is on this 4th day of October, 1960,

ORDERED, ADJUDGED and DECREED:

(1) That defendant's motion for summary judgment be and hereby is granted; and

(2) That plaintiff's motion for summary judgment be and hereby is denied, and his action dismissed.

IT IS FURTHER ORDERED, that the Clerk of Court return to the United States Attorney the certified record of the Immigration and Naturalization Service relating to the plaintiff and filed in this cause.

(s) ALEXANDER HOLTZOFF,
Judge.

(8614-0)

SUPREME COURT, U. S.
No. 441

FILED
OCT 19 1961
JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

ROBERT E. WYNGAARD, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

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ROBERT E. WYNGAARD, PETITIONER

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ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-19) has not yet been reported. The opinion of the district court (Pet. App. 21-22) is reported at 187 F. Supp. 527.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1961 (Pet. App. 20). The petition for a writ of certiorari was filed on September 23, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a violation of Section 722(8) of the New York Penal Code, which prohibits frequenting or loitering about a public place soliciting men for the purpose of committing a crime against nature, is a crime involving moral turpitude under the Immigration and Nationality Act.

2. Whether the statutory provision for the exclusion of aliens who have been convicted of a crime involving moral turpitude is unconstitutionally vague.

STATUTES INVOLVED

Section 241(a) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1251) provides:

> (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> > (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * *

Section 212(a)(9) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(a)(9)) provides:

> Sec. 212(a) [t]he following classes of aliens shall * * * be excluded from admission into the United States:
>
> * * * *

> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime * * *

Section 4 of the Act of September 3, 1954 (8 U.S.C. 1182a) provides:

> Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18 [U.S.C.], by reason of the punishment actually imposed * * * may on and after September 3, 1954 * * * be * * * admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense.

* * * *

Section 722 of the New York Penal Law provides in part:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * * *
>
> 8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;
>
> * * * *

STATEMENT

Petitioner, an alien, was admitted to the United States in 1948 and in 1957 was readmitted as a lawfully returning resident. He had, in 1952, been convicted of petit larceny in New York for which he was fined $50, and in 1955, of a violation of Section 722(8) of the New York Penal Code, for which he was sentenced to imprisonment for ninety days (J.A. 1-4).[1]

Petitioner was ordered deported on the ground that he was excludable at the time of his 1957 reentry in that he had been convicted of crimes involving moral turpitude (J.A. 2-4). Since a single petty crime involving moral turpitude may be waived under 8 U.S.C. 1182a, *supra*, p. 3, petitioner's deportation was mandatory only if both offenses of which he was convicted are considered crimes involving moral turpitude within the purview of Section 212(a)(9) of the Immigration and Nationality Act.

In a complaint for declaratory judgment filed in the United States District Court for the District of Columbia, petitioner challenged the order of deportation on the ground that a violation of Section 722(8) of the New York Penal Code was not a crime in New York and accordingly that his conviction thereunder was neither conviction of a crime nor of an offense involving moral turpitude (J.A. 1-3). He also contended that the statute was void for vagueness and requested the convening of a three judge

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[1] "J.A." refers to the joint appendix in the court of appeals.

court (J.A. 2-3, 7). The district court denied the motion to convene a three judge court (J.A. 12) and granted summary judgment for respondent (J.A. 13). The court of appeals affirmed *per curiam* (Pet. App. 17-19.)

ARGUMENT

1. The holding below, that a conviction under Section 722(8) of the New York Penal Code is a crime involving moral turpitude, is in accord with the decisions of the Second Circuit in *Babouris* v. *Esperdy*, 269 F. 2d 621 (C.A. 2), certiorari denied, 362 U.S. 913; *Hudson* v. *Esperdy*, 290 F. 2d 879 (C.A. 2), petition for a writ of certiorari pending No. 382, this Term (both relating to deportation); and *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 409 (C.A. 2) (relating to exclusion). The Second Circuit in those cases rejected the contention that, because the proscribed conduct is described as an "offense" under New York law, it is not a "crime" for the purpose of the federal immigration laws. Petitioner offers no valid reasons why those decisions should not be followed. Indeed, to the extent that this case involves the exclusion provision, Section 212 of the Immigration and Nationality Act (8 U.S.C. 1182), rather than the deportation provision, Section 241 (8 U.S.C. 1251), the intent of Congress to reach all conduct constituting moral turpitude, regardless of labels, is clear. Under Section 212(a)(9) not only are aliens convicted of such crimes excluded, but also excluded are those who admit having committed acts which constitute the essential elements

of such crimes. That Congress understood the section as covering convictions for petty offenses is shown by the Act of 1954, 8 U.S.C. 1182a, *supra*, which provides that one conviction for a petty offense may be waived.

There is no conflict between the decision below and the cases cited by petitioner. *Pino* v. *Landon*, 349 U.S. 901, and the courts of appeals cases cited,[2] all of which arose under the deportation section, involved the question whether there had in fact been a conviction (as to which state law was held determinative), not whether the conviction was for a crime within the meaning of the federal statute. Moreover, even looking to state law, the fact that New York classifies the conduct here involved as an offense does not mean that New York does not regard the offense as a "crime" in the general sense of that term. To the contrary, in *People* v. *Moss*, 309 N.Y. 429, 433 (1956), the court pointed out that the "public offense" of vagrancy under Section 887 of the Code of Criminal Procedure had all the attributes of a criminal proceeding, that a conviction thereof resulted in a penal judgment and execution, and that the proceedings against vagrants were basically as punitive as any sentence imposed for crime. Accord, *People ex rel. Stolofsky* v. *Superintendent*, 259 N.Y.

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[2] *Holzapfel* v. *Wyrsch*, 259 F. 2d 890 (C.A. 3); *United States ex rel. Freislinger* v. *Smith*, 41 F. 2d 707 (C.A. 7). In the district court cases cited by petitioner (Pet. 7-8, 9), there were no convictions; the issue was whether the acts admitted by the aliens amounted to a crime of moral turpitude.

115, 117-118. See also *People* v. *Pearson*, 69 N.Y. Supp. 2d 242, where it was held that one who aids and abets in the commission of the offense of disorderly conduct may properly be convicted as a principal under Section 2 of the New York Penal Law, which defines a principal as "[a] person concerned in the commission of a crime." The court stated (p. 243) that the offense of disorderly conduct "is in the nature of a crime and has all the attributes of a crime."

2. Petitioner argues (Pet. 13-14) that the offense defined by Section 722(8) does not involve moral turpitude in that it does not require evil intent. The particular section here involved, however, punishes conduct only when done "for the purpose of committing a crime against nature or other lewdness". Thus, assuming *arguendo* that evil intent is required to constitute moral turpitude, a specific immoral intent is an element of this offense.

3. That the use of the term "moral turpitude" does not render the deportation section vague was settled by *Jordan* v. *De George*, 341 U.S. 223. Its reasoning applies with even greater force to the statute setting forth grounds for exclusion. As applied to the particular section of the New York Penal Code involved in this case, there can be no question that the offense involved moral turpitude.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

OCTOBER 1961

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